BRB No. 01-0880 BLA

VIRGIL CALDWELL	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	DATE ISSUED:
	)	
Respondent	)	DECISION and ORDER

Appeal of the Decision and Order on Remand - Denial of Benefits of Robert L. Hillyard, United States Department of Labor.

Theodore E. Harman (Ungaretti & Harris), Chicago, Illinois, for claimant.

Barry H. Joyner (Eugene Scalia, Solicitor of Labor; Donald S. Shire, Associate Solicitor; Rae Ellen Frank James, Deputy Associate Solicitor; Michael J. Rutledge, Counsel for Administrative Litigation and Legal Advice), Washington, D.C., for the Director, Office of Workers' Compensation Programs, United States Department of Labor.

Before: DOLDER, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

DOLDER, Chief Administrative Appeals Judge:

Claimant appeals the Decision and Order - Denial of Benefits (99-BLA-0246) of Administrative Law Judge Robert L. Hillyard on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act).[1] This case is before the Board for a fourth time. The lengthy history of this case is set forth in the Board's most recent decision in *Caldwell v. Director, OWCP*,

[1] The Department of Labor has amended the regulations implementing the Federal Coal Mine Health and Safety Act of 1969, as amended. These regulations became effective on January 19, 2001, and are found at 20 C.F.R. Parts 718, 722, 725, and 726 (2001). The regulations at issue in this case found at 20 C.F.R. §727.203 (2000), however, are not affected by these amendments. 20 C.F.R. §725.2, 725.4(a), (d), (e)(2001).

BRB No. 00-0216 BLA (Nov. 8, 2000)(unpub.). In its most recent remand of this case, the Board affirmed the administrative law judge's finding that the interim presumption was invoked pursuant to 20 C.F.R. §727.203(a)(1), but remanded the case for reconsideration of whether the presumption was rebutted pursuant to 20 C.F.R. §727.203(b)(3).[2] The Board, therefore, vacated the denial of benefits. *Caldwell*, *supra*. On remand, the administrative law judge accorded greatest weight to the medical opinion of Dr. Hudson and again found that employer established rebuttal of the interim presumption pursuant to Section 727.203(b)(3). Accordingly, benefits were again denied.

On appeal, claimant contends that the administrative law judge erred in according greater weight to the opinion of Dr. Hudson than to the opinions of Drs. Hessl and Cohen and thus erred in finding rebuttal established pursuant to Section 727.203(b)(3). Claimant further asserts that he is also entitled to invocation of interim presumption pursuant to Section 727.203(a)(4). Lastly, claimant asserts that Dr. Hessl's opinion of a mild respiratory impairment is sufficient to establish total disability in light of the strenuous nature of claimant's usual coal mine employment. The Director responds urging affirmance of the denial of benefits as the administrative law judge properly found rebuttal of the presumption established at Section 727.203(b)(3). Alternatively, the Director contends that if the administrative law judge's finding of rebuttal at Section 727.203(b)(3) is not affirmed and the case is remanded, then the administrative law judge's finding that invocation of the presumption was established pursuant to Section 727.203(a)(1) should be vacated and the

[2] The Board affirmed, as unchallenged on appeal, the administrative law judge's finding that the interim presumption was not invoked pursuant to 20 C.F.R. §727.203(a)(2), (3), and was not rebutted pursuant to Section 727.203(b)(1), (2). The Board also affirmed the administrative law judge's finding that total disability was not established at 20 C.F.R. §718.204(c). *Caldwell v. Director, OWCP*, BRB No. 00-0216 BLA (Nov. 8, 2000)(unpub.), citing *Skrack v. Island Creek Coal Co.*, 6 BLR 1-710, 1-711 (1983). Additionally, in light of its affirmance of the administrative law judge's finding of invocation at Section 727.203(a)(1), the Board affirmed the administrative law judge's finding that rebuttal at Section 727.203(b)(4) was precluded. *Caldwell*, *supra*.

case remanded for reconsideration of the x-ray evidence thereunder. In reply to the Director's response brief, claimant argues that the administrative law judge properly found the presumption invoked at Section 727.203(a)(1), and that the administrative law judge erred in finding the presumption rebutted at Section 727.203(b)(3).

The Board's scope of review is defined by statute. If the administrative law judge's findings of fact and conclusions of law are supported by substantial evidence, are rational, and are consistent with applicable law, they are binding upon this Board and may not be disturbed. 33 U.S.C. §921(b)(3), as incorporated into the Act by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

Claimant asserts that the medical opinion evidence fails to support a finding of rebuttal at Section 727.203(b)(3). Specifically, clamant contends that because "lung volume" tests have clearly demonstrated a diminished lung volume, and Dr. Hudson did not conduct lung volume tests, Dr. Hudson's opinion of no pulmonary impairment, Director's Exhibit 93, cannot rebut the diminished lung capacity shown by the lung volume test. Claimant also contends that Dr. Hudson's opinion is entitled to little weight because he concluded that claimant did not suffer from pneumoconiosis. Further, claimant contends that because invocation of the presumption at Section 727.203(a)(1) presumes total disability due to pneumoconiosis, and Section 727.203(b)(3) itself assumes total disability, allowing rebuttal where disability is caused by some disease other than pneumoconiosis as defined by the Act, the burden rests with the Director to show some other cause of disability in order to rebut the presumption, which, in this case, he has failed to do.

In order to establish rebuttal of the interim presumption of total disability due to pneumoconiosis pursuant to Section 727.203(b)(3) the party opposing entitlement must prove that pneumoconiosis is not a contributing cause of total disability. 20 C.F.R. §727.203(b)(3); *Warman v. Pittsburg & Midway Coal Mining Co.*, 839 F.2d 257, 11 BLR 2-62 (6th Cir. 1988); *Gibas v. Saginaw Mining Co.*, 748 F.2d 1112, 7 BLR 2-53 (6th Cir. 1984); *cert. denied*, 471 U.S. 1116 (1985). A party opposing entitlement may establish rebuttal of the presumption based on the opinion of a physician who unequivocally states that claimant suffers from no respiratory or pulmonary impairment, because the absence of a pulmonary impairment precludes a finding that pneumoconiosis is the cause of total disability. *Marcum v. Director, OWCP*, 11 BLR 1-23, 1-25 (1987); *see Grigg v. Director, OWCP*, 28 F.3d 416, 18 BLR 2-299 (4th Cir. 1999).

In the instant case, the administrative law judge found that Dr. Hudson's opinion, that claimant suffered from no pulmonary or respiratory impairment, was entitled to greater weight than the opinion of Dr. Hessl because Dr. Hudson actually examined claimant, as opposed to Dr. Hessl who relied on the examination of a registered nurse, and the objective testing relied on by Dr. Hudson was four years more recent than the testing relied on by Dr.

Hessl and supported Dr. Hudson's opinion of no respiratory impairment, while the objective testing, *i.e.*, a pulmonary function study and blood gas study, relied upon by Dr. Hessl was non-qualifying.[3] Further, in responding to the Board's instructions to weigh Dr. Hudson's finding of "no pulmonary impairment" against Dr. Hessl's finding of a restrictive defect based on lung volume testing, the administrative law judge noted that there was no support for Dr. Hessl's diagnosis other than the May 20, 1994 pulmonary function study which was administered by Dr. Robert Cohen. Dr. Cohen interpreted this study as showing "normal spirometry," although he went on to also diagnose "a mild restrictive defect by lung volumes." The administrative law judge, concluded that because these interpretations, upon which Dr. Hessl relied, were confusing and conflicting, his opinion was less credible than Dr. Hudson's. This was rational. Decision and Order on Remand at 3; *see Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Peskie v. United States Steel Corp.*, 8 BLR 1-126 (1985); *Lucostic v. United States Steel Corp.*, 8 BLR 1-46 (1985); *York v. Jewell Ridge Coal Corp.*, 7 BLR 1-766 (1985); *Oggero v. Director, OWCP*, 7 BLR 1-860 (1985); *Cooper v. United States Steel Corp.*, 7 BLR 1-842 (1985). Accordingly, we hold that the administrative law judge complied with our instructions when he considered the opinion of Dr. Hudson in light of the contrary opinion of Dr. Hessl.

[3] A "qualifying" pulmonary function study yields values that are equal to or less than the appropriate values set out in the table at Section 727.203(a)(2). A "non-qualifying" study exceeds those values. *See* 20 C.F.R.§727.203(a)(2).

Further, as the Board did when this case was previously before it, we also reject claimant's assertion that Dr. Hudson's opinion is entitled to no weight at Section 727.203(b)(3) because he failed to diagnose the existence of pneumoconiosis. Because Dr. Hudson opined that claimant had no respiratory impairment whatsoever, not that claimant's total disability did not arise out of coal mine employment, his failure to diagnose the existence of pneumoconiosis does not render his opinion less credible. *See Marcum, supra*; *Cf. Gibas, supra*; *see also Brinkley v. Peabody Coal Co.*, 14 BLR 1-147, 1-50-151 (1990). We also reject, as the Board did previously, claimant's assertion that the burden rests with the Director to affirmatively establish an alternative basis of disability in order to rebut the presumption at Section 727.203(b)(3). Contrary to claimant's assertion, a finding that claimant suffers from no pulmonary or respiratory impairment whatsoever supports a finding of rebuttal at Section 727.203(b)(3), *see Marcum*, *supra*, and the party opposing entitlement need not identify an alternative etiology of disability, *see Welch v. Benefits Review Board*, 808 F.2d 443, 446, 9 BLR 2-196, 2-200 (6th Cir. 1986); *see also Brinkley* at 1-150-151. We therefore affirm the administrative law judge's determination that the medical opinion evidence supports a finding of rebuttal pursuant to Section 727.203(b)(3).[4] *See Warman, supra*; *Gibas*, *supra*.

Claimant next asserts that the medical opinion evidence of record supports a finding of invocation at Section 727.203(a)(4). Because the evidence of record supports a finding of rebuttal at Section 727.203(b)(3), however, we need not address claimant's argument regarding subsection (a)(4) invocation. *See Warman, supra*; *see also Gibas*; *cf. Saginaw Mining Company v. Ferda*, 879 F.2d 198, 12 BLR 2-376 (6th Cir. 1989).

Finally, citing *Eagle v. Armco, Inc.*, 943 F.2d 509, 15 BLR 2-201 (4th Cir. 1991), claimant asserts that Dr. Hessl's opinion of a mild impairment is sufficient to establish total disability given the strenuous nature of claimant's coal mine employment as a tram operator. Although this is true, *Eagle*, *supra*; *see Walker v. Director, OWCP*, 927 F.2d 181, 15 BLR 2-16 (4th Cir. 1991), in this case, the opinion cannot support a finding of total disability as the administrative law judge found it unreasoned, *see* discussion, *supra*; *Clark, supra*; *Peskie*, *supra*; *Lucostic*, *supra*; *York*, *supra*; *Oggero*, *supra*; *Cooper*, *supra*.

Accordingly, the administrative law judge's Decision and Order on Remand - Denial of Benefits is affirmed.

SO ORDERED.

[4] In view of our holding affirming the administrative law judge's finding of Section 727.203(b)(3) rebuttal, we need not address the Director's argument concerning Section 727.203(a)(1) invocation as the assertion is rendered moot. *See Warman*, *supra*; *Gibas*.

NANCY S. DOLDER, Chief
Administrative Appeals Judge

I concur:

ROY P. SMITH
Administrative Appeals Judge

McGranery, J., dissenting:

I respectfully dissent from the majority's decision to affirm the denial of benefits in the instant case. I believe that the administrative law judge erred in relying upon Dr. Hudson's opinion to establish rebuttal for two reasons, each of which, independently, requires reversal.

First, having determined that the weight of the x-ray evidence was sufficient to establish invocation of the interim presumption at 20 C.F.R. §727.203(a)(1), the administrative law judge could not reasonably credit Dr. Hudson's opinion, finding no pneumoconiosis, to establish that claimant's total disability did not arise in whole or in part out of coal mine employment at Section 727.203(b)(3). *See Skukan v. Consolidation Coal Co.*, 993 F.2d 1228, 1233, 17 BLR 2-97, 2-104 (6th Cir. 1993), *vacated on other grounds*, 512 U.S. 1231 (1994); *Tussey v. Island Creek Coal Co.*, 982 F.2d 1036, 1042, 17 BLR 2-16, 2-24 (6th Cir. 1993); *Adams v. Director, OWCP*, 886 F.2d 818, 820, 13 BLR 2-52, 2-63 (6th Cir. 1989), *Accord*, *Scott v. Mason Coal Co.*, No. 99-1495 (4th Cir. May 2, 2002) slip op. at 9-10.[5]

Second, the administrative law judge erred in finding that Dr. Hudson's opinion, finding no pulmonary impairment, was sufficient to establish rebuttal at Section 727.203(b)(3) in view of the doctor's notation next to the results of the pulmonary function study "(90% pred)" Director's Exhibit 93. The administrative law judge never discussed this

[5] Prior to the issuance of these decisions, in *Mosley v. Peabody Coal Co.*, 769 F.2d 357, 8 BLR 2-22 (6th Cir. 1985), the Sixth Circuit affirmed the denial of benefits where the administrative law judge had invoked the interim presumption with x-ray evidence at 20 C.F.R. §727.203(a)(1) and had found rebuttal established at Section 727.203(b)(3), based upon medical opinions finding no pneumoconiosis but disabling heart disease. The apparent conflict between the invocation and rebuttal evidence was not discussed.

notation which appears to be a reference to the American Medical Association's Guides to the Evaluation of Permanent Impairment (4th ed. 1993). The chapter on the respiratory system, chapter 10, contains extensive tables showing predicted values for pulmonary function testing; these tables provide a basis for physicians to rate the permanent impairment corresponding to the loss of lung function. Since the doctor's notation of "90% pred" suggests a finding of a 10 percent permanent impairment, I do not believe the administrative law judge could reasonably rely upon the doctor's statement of "no pulmonary impairment" without discussing the apparent inconsistency in his report.

On the other hand, in discussing Dr. Hessl's opinion, the administrative law judge found an inconsistency where, I believe, there is none. The administrative law judge found that Dr. Hudson's opinion outweighed Dr. Hessl's opinion which was based on the pulmonary function study administered by Dr. Cohen, who interpreted it as showing both "normal spirometry" and "A mild restrictive defect by lung volumes." The administrative law judge rejected this interpretation: "I find that the interpretation of normal spirometry and mild restrictive defect are confusing if not outright conflicting." Decision and Order On Remand 3. Apparently the administrative law judge does not realize that there is a normal range which includes less than optimum performance. It would appear that Dr. Hudson's diagnosis of no impairment is questionable in light of his finding of 90% of predicted performance and that the latter finding could be consistent with a mild defect. Thus, the administrative law judge did not rationally analyze the medical opinion evidence when he found that Dr. Hudson's opinion of no pulmonary impairment was sufficient to establish rebuttal at Section 727.203(b)(3).

In sum, I believe Dr. Hudson's opinion is not a credible opinion constituting substantial evidence sufficient to establish rebuttal at Section 727.203(b)(3) because he diagnosed no pneumoconiosis when the evidence established the existence of pneumoconiosis and he diagnosed no pulmonary impairment, while finding claimant had a 10 percent impairment. Accordingly, I would reverse the administrative law judge's decision and remand the case to the district director for an award of benefits.

REGINA C. McGRANERY
Administrative Appeals Judge